APPENDIX A
INTERSTATE COMMERCE COMMISSION

INITIAL DECISION

No. 37336 F

SOUTH CAROLINA RAILWAYS COMMISSION

v.

SEABOARD COAST LINE RAILROAD COMPANY [1]

Demurrage charges at issue applicable but the collection of those charges by defendants found unjust and unreasonable. Schedule ordered canceled.

Peter A. Greene and *Norman J. Philion* for complainant.

James L. Howe, III and *Phyllis A. Joyner* for defendants.

By Jerry F. Laughlin, Administrative Law Judge:

By appropriate order of the Commission, the matter was assigned for handling under modified procedure. Subsequently, the proceeding was assigned to this Administrative Law Judge for an initial decision thereon.

By complaint filed December 18, 1979, South Carolina Public Railways Commission (SCPRC or complainant) alleges that a tariff caused to have been published August 6, 1977, in Supplement 196 of SFTB 988-A, ICC S-909, Southern Export Grain Tariff Item 380(F) which reads as follows:

[1] Also named as defendant is Southern Railways Company.

> Cars shall remain in the demurrage account of the inbound line-haul railroad and demurrage charges shall cease to accrue at the time each car is released.

is in violation of 49 U.S.C. 10107(a) (2) and (3) and 49 U.S.C. 10701, 10750 and 11121, and requests that an order be entered ordering defendants (Seaboard Coast Line Railroad-SCL, and Southern Railway Company-SRC) to cancel such tariff provision.[2]

Complainant is an agency of the State of South Carolina created by an act of the General Assembly of that State whose responsibility is the control and operations of common carrier railroads owned by the State. As here pertinent, complainant controls and operates two Class III common carrier terminal switching railroads in the Charleston, SC port area. These railroads are respectively, Port Utilities Commission of Charleston, SC, (PUCC) and Port Terminal Railroad of South Carolina (PTSC). The PUCC is located in Charleston and consists of approximately 6 miles of track serving private industry and the marine terminals of the South Carolina State Ports Authority in Charleston. The PTSC certificated by the ICC as a common carrier railroad, is located at North Charleston and consists of about 4.6 miles of track serving private industry and the marine terminals of the South Carolina State Ports Authority at North Charleston.

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[2]The above described item, among others, incorporated a number of tariff charges concerning demurrage charges. In Suspension Case No. 67012 the Commission's Suspension and Fourth Section Board decided not to suspend or investigate these items and the Commission, Division 2, denied an appeal and the proposal became effective August 6, 1977. Subsequently, in No. 36927, the Commission, Division 1, one member dissenting, in a proceeding involving the same tariff provision, denied a Petition for Declaratory Order, an action affirmed in a decision served November 20, 1979.

Located at North Charleston is a grain elevator with a capacity of approximately 1.6 million bushels that is on the tracks of and served by PTSC. This elevator is engaged in receiving grain from rail cars which is subsequently transferred to ocean-going vessels for shipment to export markets; about 1,250-1,500 rail cars of grain are received by this facility per year. Rail cars destined to the elevator are received by the PTSC from the line-haul carriers at the PTSC yard at North Charleston. The interchange between PTSC and line-haul carriers occurs pursuant to the AAA rules regarding interchange and freight claim and the Code of Car Service and Car Hire Rules. Upon receipt of the loaded cars, the PTSC notifies the elevator of arrival and depending upon the availability of space will either actually or constructively place the cars; cars constructively placed by the PTSC are held on the tracks of PTSC until actually placed at the elevator. When the cars are unloaded, PTSC removes them. The line-haul carrier is not involved in any way with the placement, holding, handling, release or removal of cars consigned to the elevator. PTSC classifies and delivers the empty cars to the line-haul carriers in the PTSC yard on tracks owned by the PTSC. Since it is in the position, PTSC undertakes determination, assessment and collection of demurrage charges consigned to the elevator. Under the present per diem reclaim agreement, complainant can reclaim all per diem due on all cars of export grain subject to the provision in question. The line-haul carriers it is urged are unable to perform the necessary functions with regards to demurrage as they have no knowledge of the time of actual or constructive car placement or the time of release of the cars. In 1976, 6,819 car days of demurrage were incurred by the elevator. Complainant asserts that substantial operating expenses are incurred (1) maintaining storage tracks and related facilities for the holding of cars that cannot be im-

mediately placed, (2) providing facilities for prompt and efficient handling of cars, and (3) performing records, surveillance and other functions necessary for accurate determination, assessment and collection of demurrage; these expenses are incurred, it asserts, in addition to routine switching of cars. The line-haul carriers absorb a switch charge of $24.25 in connection with the movement of grain, but complainant submits that this charge covers only a part of the normal switching costs and the costs enumerated above are over and above the costs of switching. The cost of additional services must be paid for by the portion of demurrage charges retained by the PTSC. During 1976, the last full year (before publication of the disputed tariff) the revenues of PTSC attributable to demurrage was $125,405 or about 61 percent of the gross revenue for PTSC that year. That revenue, it is said, was not sufficient to cover the costs incurred in the activities related to demurrage. Even with demurrage revenues, PTSC has averaged a loss of $133,302 per year for the four year period 1974-1978.

Complainant argues that the tariff in question is impossible to apply for the reason that since the line-haul carriers serving North Charleston do not actually or constructively place cars at the elevator they cannot determine the applicable demurrage charges; that since the line-haul carriers do not serve the industries they bill, their use of estimates in the calculation of demurrage charges would be inconsistent with respect to the maintenance of proper demurrage records; and that such tariff provision should not prevail in light of the foregoing circumstances. Complainant stresses that it is not in the railroad business by choice or is PTSC operated for the purpose of generating profits, and in order to provide the essential terminal services required by the shipping public who use the port

facilities of North Charleston it must be compensated, at least in part, from revenues accruing from administering and enforcing car demurrage rules.

In their statement defendants submit that there is no justification to complainant's position that demurrage charges collected on foreign grain cars should be its revenue item for the reason that this position ignores the fact that demurrage is part penalty for incentive to encourage prompt release of cars, and, in part an element of compensation for the use of cars for storage, and not primarily as a source of revenue. See *Commerce & Industry Assn. of N.Y., Inc. v. B&D R. Co.*, 281 I.C.C. 655, *Ormet Corp. v. Illinois Central R. Co.*, 341 I.C.C. 647, and Ex Parte 289, *Remittance of Demurrage Charges*, 353 I.C.C. 567; that concerning the penalty element, the ultimate receiver of demurrage charges collected is immaterial to the person penalized, that relating to compensation, it would be inconsistent for demurrage to be paid to a railroad which does not contribute to the national freight car fleet as it owns no freight cars; and that switching railroads should derive their revenues from switching charges and not from the collection of demurrages. It is argued that it is incredible that complainant takes the position it needs to secure demurrage charges for revenue purposes in face of the provisions in 49 USC 10750 that demurrage charges should be established in a way that fulfills the needs to freight car use and distribution, and maintenance of an adequate supply of freight cars to be available. Defendants suggest that if complainant is in need of additional revenue, it should endeavor to provide it with increased switching charges and charges for storing grain cars should be compensated by duly published storage charges and not through demurrage. It is asserted that there are no facts to substantiate any additional costs

suffered by complainant other than switching and some bookkeeping expenses, that the tariff provision in question is practical and workable and any difficulty in application is due to the refusal of complainant to allow line-haul carriers access to demurrage records; and that such provision is just and reasonable in accordance with 49 USC 10701, 10750 and 11121.

In its reply statement, complainant submits that the tariff provision in question has created an intolerable situation whereby PTSC incurs the expense of providing the facilities and services necessary to comply with the Commission's demurrage rules, but defendants who provide none of the facilities utilized in holding cars at North Charleston nevertheless collect the demurrage charges accruing on cars held on the lines of PTSC, and that it is well established that demurrage charges are properly collectable by the carrier on whose lines cars are held. See *Union Belt of Detroit Pooling of Revenues,* 201 I.C.C. 577, and *Demurrage Rules and Charges, Nationwide,* 340 I.C.C. 83. Complainant avers that contrary to the suggestions posed by defendants, it cannot impose storage charges as a shipper cannot be compelled to pay a storage charge on cars which are already incurring demurrage, nor can switching charges be assessed in connection with handling of cars held on demurrage as a shipper is entitled under applicable line-haul rates to placement of cars for loading and unloading and any handling of the cars prior to such placement is not the shippers' responsibility, and that should complainant obtain the funds necessary to continue to maintain the functions necessary to administer the Commission's demurrage rules, the divided responsibilities and needless handling and transfer of information that would be necessitated by defendants' tariff provision would detract from the efficiency with which demurrage is now accrued and collected.

DISCUSSION AND CONCLUSIONS

The issue to be here resolved is whether the Commission will sanction an arrangement whereby the line-haul carriers collect demurrage charges attributable to demurrage accrued on the lines of a terminal carrier. Manifestly, the Commission has held that demurrage may not lawfully be collected by one carrier when another carrier performs the transportation. On the other hand, the purpose of demurrage charges is part penalty for incentive to encourage prompt release of cars, and, in part to compensate the railroad for use of their cars for storage, and is not considered primarily as a revenue item. The facts reveal that complainant (who owns no rail cars) over its own tracks performs all of the functions necessary for handling the cars to and from the grain elevator, including operations involved in the holding of cars accruing demurrage. Defendants are not involved with the placement, holding, handling or release of the cars. The switching revenues received by complainant are insufficient over the cost of this service and the cost of the additional service, it is claimed, must be defrayed by collection of demurrage revenues. The problem arises as to which party is entitled to the demurrage charges. Based on a point of equity, and in keeping with Commission precedence, a finding must be made on behalf of complainant for the reason that it is complainant, not defendants, who performs all the necessary functions which actually results in demurrage; defendants only contribution is their delivery of the cars to complainant. The revenues collected by complainant for demurrage are considered a source of compensation for the cost of services rendered, rather than a revenue item. In addition to this equitable solution is the fact that the Commission has long held that demurrage charges are properly collectable by the carrier on whose lines cars are

held. Significantly, the prompt release element of demurrage charges is not voided by the finding made herein as it is immaterial to the person penalized who collects such charges so long as the car is released, and the denial of compensation for use of cars for storage (another element of demurrage) is not seriously damaging to defendants considering the minimum efforts expanded by them in serving the North Charleston terminal.

Another matter, it is questionable whether defendants, since they do not serve the industries they bill, can accurately assess the proper demurrage charges in the absence of documents necessary to reflect such charges.

In reaching the conclusions herein, proper consideration has been duly given to Ex Parte 289, *Remittance of Demurrage Charges, supra - Commerce & Industry, supra,* and *Ormet Corp., supra.* Any other issue raised and not discussed nevertheless has been considered.

FINDINGS

Upon consideration of all evidence of record, the Administrative Law Judge finds that the demurrage charges at issue (reflected in Supplement 196 of SFTB 988-A, ICC S-909, Southern Export Grain Tariff Item 380(F)) applicable, but the collection of those charges by defendants found unjust and unreasonable.

Premises considered, it is the ORDER of the Administrative Law Judge that the provisions of the issue tariff be canceled.

The Administrative Law Judge further finds, That this action will not significantly affect either the quality of the human environment or consideration of energy resources.

Dated at Washington, DC, this 18th day of June, 1980.

/s/
By the Commission, Jerry F. Laughlin, Administrative Law Judge

Agatha L. Mergenovich
Secretary

(SEAL)

APPENDIX B

INTERSTATE COMMERCE COMMISSION

DECISION

No. 37336 F

SOUTH CAROLINA RAILWAYS COMMISSION

v.

SEABOARD COAST LINE RAILROAD COMPANY ET AL.[1]

Decided December 19, 1980

Defendants, Seaboard Coast Line Railroad Company (Seaboard) and Southern Railway Company (Southern), filed an administrative appeal to the initial decision of the Administrative Law Judge (ALJ) served June 24, 1980. Complainant South Carolina Public Railways Commission replied.

At issue is the lawfulness of item 380(F), Supplement 196, Southern Freight Association, Agent, Tariff 988-A, ICC S-909. This item essentially provides that demurrage charges paid shall accrue to the account of the in-bound line-haul rail carrier and not the terminating railroad. It applies generally on carloads of grain for export from South Atlantic, South Florida and Gulf Ports east of the Mississippi River, and has been in effect since August 6, 1977.

The ALJ found that the assailed tariff item was unlawful and ordered that it be canceled. We affirm this finding. However, the appeal requires a more detailed discussion of certain issues.

[1]Also named as a defendant is Southern Railway System.

At Charleston the complainant operates two terminal switching railroads: Port Utilities Commission of Charleston, SC (PUCC) and Port Terminal Railroad of South Carolina (PTSC). PUCC operates about 6 miles of track in Charleston proper. PTSC operates 4.6 miles of track in North Charleston. Both serve private industry and the State's respective marine terminals.

The controversy between the parties concerns whether the line-haul carriers or PTSC should receive the demurrage charges that accrue on the carloads of grain which the line-haul carriers (Seaboard and Southern) interchange with PTSC at its North Charleston yard for terminal switching and delivery. After receiving the cars from the line-haul carriers, PTSC moves them to the local grain elevator which transfers the grain to ocean-going vessels for export. Upon receipt of the loaded cars, PTSC notifies the elevator of arrival and, depending upon the availability of space, either actually or constructively places the cars at the elevator. Cars constructively placed by PTSC are held on its tracks until actually placed at the elevator. After unloading, PTSC removes, classifies, and delivers the empty cars to the line-haul carriers at its North Charleston yard.

The Southeastern Demurrage and Storage Bureau (Demurrage Bureau) now assesses and collects all demurrage charges on cars consigned to the elevator.[2] It does so based on the detention records of PTSC, but for the accounts of Seaboard and Southern.

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[2]The demurrage charges are made applicable pursuant to item 130 of Seaboard Coast Line Railroad Company Tariff, ICC SCL 8031-B, to which PTSC and PUCC are parties. Tariff 8031 is made applicable to the movements at issue by reason of the "omnibus clause" published in the subject line-haul export tariff.

In 1978, the defendants owned 75.4 percent of the grain cars carrying traffic exported from Charleston, other railroads owned 22 percent, and 2.6 percent were shipper owned. PTSC and PUCC pay per diem charges on the considered traffic but offset most of this money pursuant to a per diem reclaim agreement. During the period August 1, 1977 through December 31, 1978, the cars delivered to PTSC and PUCC at Charleston by Seaboard earned $131,930.94 in per diem charges. During that period the two switching carriers had reclaim charges of $129,029.85 resulting in a net balance of $2,901.09 which they paid to Seaboard.

DISCUSSION AND CONCLUSIONS

Defendants argue that the assailed tariff provision has been approved by this Commission. They note that the Commission did not suspend the tariff item when it was initially published. They also cite No. 36927, *South Carolina Public Railways Commission - Petition for Declaratory Order* (not printed), decided November 14, 1979, where Division 1 refused to institute a declaratory order proceeding to address the lawfulness of item 380(F). Defendants characterize this decision as a finding that item 380(F) is just and reasonable. There is no merit to this contention. As Division 1 noted in No. 36927, the appropriate means of challenging the tariff item was to file a complaint under 49 U.S.C. 11701. That complaint is now before us.

Defendants also contend that Commission precedent does not support the ALJ's finding that the tariff rule is unreasonable. We disagree. The Commission has frequently stated that demurrage charges are both *assessed* and *retained* by the carrier *on whose line the detention oc-*

curs. See, e.g., *Demurrage Rules and Charges, Nationwide,* 340 I.C.C. 83, 92 (1971).

The terminating carrier is justified in keeping these charges because of operational and practical reasons surrounding their assessment and collection. Thus, its tracks have been turned into a temporary warehouse for which it should be compensated. Additional handling is necessitated for cars on constructive placement and costs are incurred in accounting for these cars as well as assessing and collecting these charges. Moreover, because the cars are detained on its tracks, the terminating railroad is in the best position to develop accurate information as to the actual and constructive placement and release of those cars.

Defendants argue that if the terminating carriers were to collect and keep the demurrage charges, they would have an economic incentive to delay the release of the cars. This argument is specious. The amount of demurrage to be collected is governed by the time expiring between the placement and release of the cars. Naturally, the consignee wants to release the cars as fast as possible to avoid paying excessive demurrage. Once the cars are released to the terminating carrier, that carrier has no reason to delay returning the cars to the line-haul carrier.

Defendants object to the terminal carrier at Charleston being allowed to keep the demurrage charges because it "pays no per diem." As noted above, both PTSC and PUCC pay per diem charges, but these payments are offset by reclaim charges and thus the balance due defendants is usually rather small. But the defendants are confusing the purpose of demurrage charges with the purpose of per diem charges. Per diem charges represent rental payments

by one railroad for the use of cars belonging to another railroad. Defendants emphasize the fact that they own the preponderance of the considered grain cars, and argue that the car owners should collect the demurrage charges because they provide "compensation to the carrier for the cost of the car." On the contrary, it is the per diem charges which are paid to car owners as a fair compensation for the use of equipment. See *Charleston Port Utilities Com. v. Baltimore & C.S.S. Co.*, 155 I.C.C. 365, 370 (1929). If the defendants are dissatisfied with the amount of compensation they receive for use of their cars from the switching carriers at Charleston, their proper remedy is to renegotiate the per diem reclaim agreement with those carriers.

In view of these considerations, we conclude that publication of tariff item 380(F) constituted an unreasonable practice violative of 49 U.S.C. 10701.

Arguments and requested findings not discussed in this decision nor reflected in our findings or conclusions have been considered and found not justified.

We find:

The evidence considered in the light of the administrative appeal and reply does not warrant a result different from that reached by the Administrative Law Judge. His statement of facts, conclusions and findings, as supplemented, being proper and correct in all material respects, are affirmed and adopted as our own. This decision does not significantly affect either the quality of the human environment or conservation of energy resources.

It is ordered:

The administrative appeal is denied. Defendants shall cancel para. (F) of item 380 within 35 days from the date of service of this decision. This proceeding is discontinued.

By the Commission, Review Board Number 4, Members FitzPatrick, Fisher, and Dowell.

AGATHA L. MERGENOVICH
Secretary

(SEAL)

APPENDIX C

INTERSTATE COMMERCE COMMISSION

No. 37336 F

SOUTH CAROLINA RAILWAYS COMMISSION v. SEABOARD COAST LINE RAILROAD COMPANY[1]

Decided December 3, 1981

Rights to demurrage charges as between line-haul and terminal carriers discussed and tariff rule interpreted.

Peter A. Greene and *Norman J. Philion III* for complainant.

James L. Howe III and *Phyllis A. Joyner* for defendants.

DECISION

By the Commission:

BACKGROUND

This proceeding has been reopened for administrative review on the present record by decision served May 11, 1981, wherein this Commission found that this proceeding involves matters of general transportation importance.

The central issue concerns whether a specific tariff provision which provides that demurrage charges should accrue to the line-haul carrier rather than terminal switching

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[1]Also named as a defendant is Southern Railway System.

carrier is reasonable. The facts are set out in the prior decisions and will be restated only to the extent necessary to clarify our reasoning.

Complainant/respondent is an agency of the State of South Carolina and operates two terminal switching carrier in the Charleston, SC port area: the Port Utilities Commission of Charleston (PUCC); and the Port Terminal Railroad of South Carolina (PTSC). Defendants/petitioners are two line-haul carriers serving the Charleston port area: the Seaboard Coast Line Railroad Company (SCL); and the Southern Railway Company (SRC).

The controversy concerns whether the line-haul or terminal switching carriers should retain demurrage charges that accrue on the carloads of grain that the line-haul carriers interchange with PTSC at its North Charleston yard. The PTSC and PUCC own no cars, but perform all the necessary functions for the ultimate delivery of the cars, including notifying the elevator and actual or constructive placement of the cars for unloading.[2] After unloading, PTSC removes, classifies, and delivers the empty cars to the line-haul carriers at its North Charleston yard. The Southeastern Demurrage and Storage Bureau now assesses and collects all demurrage charges on cars consigned to the elevator. It does so based on the detention records of PTSC, but for the account of the line-haul carrier.

The demurrage charges accrued to the line-haul carriers in accordance with paragraph (f) of item 380 series to Southern Freight Association, Agent, Southern Grain Export Tariff 988-A, ICC S-909, first published in supple-

[2]Actual or constructive placement occurs at the first 9 a.m., excluding Saturdays, Sundays and holidays, following the date on which the cars are interchanged with the switching carriers.

ment 196, effective August 6, 1977. This item provides that:

> Cars shall remain in the demurrage account of the imbound line-haul railroad and demurrage charges shall cease to accrue at the time each car is released.

Complainant claims that this item is (1) impractical and unreasonable in that only the switching carrier is in a position accurately to determine, assess, and collect demurrage charges, and (2) an unjust and unreasonable practice in violation of 49 U.S.C. 10701, 10750 and 11121.[3]

There have been two prior decisions in this proceeding. In an initial decision served June 24, 1980, the Administrative Law Judge found that while the tariff provision allowing the line-haul carriers to retain demurrage was legally applicable, it was unlawful. He ordered the published tariff provision canceled.

The Administrative Law Judge relied on Commission precedent holding that demurrage charges are properly retained by the carrier on whose line the cars are detained. He also found that demurrage cannot lawfully be retained by one carrier when another carrier performs the transportation. Applying equitable principles and Commission precedent, the Administrative Law Judge reasoned that the terminal switching carriers deserved the demurrage

[3]The terminal switching carriers formerly retained the demurrage charges to compensate them for switching and other terminal costs in excess of that absorbed by the line-haul carriers or recovered through per diem reclaim. The record fails to explain the reasons the carriers were unable to negotiate a new arrangement in view of the issue tariff provision, or why the prior arrangement was used. Thus we can only consider the lawfulness of the tariff item under the parties' present reclaim and switching arrangements. The previous arrangements are outside the tariff and beyond the scope of our inquiry.

because they performed all the necessary functions which actually result in demurrage. The line-haul carriers only contribution was their delivery of cars to the switching carrier. The Administrative Law Judge also questioned whether the line-haul carriers could accurately assess the proper demurrage charges since they do not serve the industries they bill.

The line-haul carriers appealed, but Review Board Number 4 affirmed the Administrative Law Judge's prior decision. Because it found that the Administrative Law Judge did not adequately discuss the question of demurrage as compensation to the car owner, the review board more fully addressed this issue.

The review board noted that of the grain cars delivered to the terminal switching lines, the defendants owned 75.4 percent, other railroads owned 22 percent, and 2.6 percent were shipper owned. It also found that the terminal switching carriers paid per diem charges on the considered traffic but offset virtually all of this money pursuant to a per diem reclaim agreement. During the period August 1, 1977 through December 31, 1978, the cars delivered to PTSC and PUCC at Charleston by Seaboard earned $131,930.94 in per diem charges. During that period the two switching carriers had reclaim charges of $129,029.85 resulting a net balance of $2,801.09 which they paid Seaboard.

In response to the line-haul carriers' argument that the terminal switching carriers should not be allowed to keep the demurrage charges because the switching carrier "pays no per diem," the review board stated that the switching carriers did in fact pay per diem charges but that these payments were offset by reclaim charges and thus the balance due defendant line-haul carriers was rather small.

The review board indicated that the defendants were confusing the purpose of demurrage charges with the purpose of per diem charges, in that per diem charges represent rental payments by one railroad for the use of cars belonging to another railroad, and thus the line-haul carriers were in fact being compensated by per diem payments. The review board added that if defendant line-haul carriers were dissatisfied with the amount of compensation they receive for use of their cars from the switching carriers at Charleston, their proper remedy is to renegotiate the per diem reclaim agreement with those carriers.

We disagree with the prior decisions and find that the assailed tariff item is lawful.

DISCUSSION

This proceeding presents the novel issue of whether the line-haul carrier or terminal switching carriers are legally entitled to retain demurrage collected from shippers whose facilities are located on the tracks of the switching railroads. The Commission has never ruled on the legality of such a demurrage provision because line-haul carriers and terminating lines usually agree on how the switching carrier will be compensated for its services.

To resolve the lawfulness of the instant tariff provision we must consider the purposes of demurrage, Commission precedent, and the legal and financial relationship between the carriers.

Demurrage is a charge that a shipper/consignee pays a rail carrier for the detention of cars beyond a period of free time. It is well established that demurrage charges

consist of two components. In *Turner Lumber Co. v. C.M. & St. P. Ry.*, 271 U.S. 259, 262; Mr. Justice Brandeis outlined the purposes:

> All demurrage charges have a double purpose. One is to secure compensation for the car and the track which it occupies. The other is to promote car efficiency by providing a deterrent against detention.

We have frequently stated that demurrage is both assessed and retained by the carrier on whose line the detention occurs. See *e.g., Demurrage Rules and Charges, Nationwide,* 340 I.C.C. 83, 92 (1971). When detention occurs at the end of a multicarrier movement the delivering carrier traditionally collects and retains all demurrage payments. *Remittance of Demurrage Charges,* 353 I.C.C. 567, 589 (1977); *Baltimore & O.C.T.R. Co. v. United States,* 583 F.2d 678, 681 n. 3 (3d Cir. 1978), cert. denied, 440 U.S. 968 (1978). These general principles reflect the underlying rationale that the carrier who incurs the costs associated with the detention of cars should be compensated by demurrage. See *Union Belt of Detroit Pooling of Revenues,* 201 I.C.C. 577, 580 (1934).

We have reviewed the legal and financial relationship between the line-haul carriers and terminal switching carriers and conclude that the line-haul carriers are the delivering carriers and thus legally entitled to demurrage.

It is common practice for terminal carriers to act as agents for line-haul carriers. *A. F. Pringle & Co., Inc., v. Atlantic Coast Line R. Co.,* 278 I.C.C. 655, 657 (1950). The facts of this case lead us to conclude that the switching roads are agents of the line-haul carriers. This agency relationship is found to exist in part because of the line-haul

carriers' absorption of switching charges.[4] Also the facts that the bills of lading were issued in the names of line-haul carriers and switching carriers do not publish a joint rate or share in the division of that rate are indicia of an agency relationship. See *Missouri Pacific Railroad Company v. Reynolds Davis Grocery Co.*, 268 U.s. 366 (1925); *Trucking L. C. L. Freight in Lieu of Rail Service*, 185 I.C.C. 71, 73 (1932); and *Allied Asphalt & Mineral Corp. v. Hoboken ...jrs.' R. Co.*, 194 I.C.C. 265, 267 (1933).

Another factor that indicates an agency relationship is the existence of a per diem reclaim agreement between the line-haul carrier and the terminal switching carriers. Under per diem reclaim line-haul carrier makes an allowance for the car-hire charges (per diem charges) that the switching carrier is assessed on cars that are switched, loaded and unloaded. The purpose of per diem reclaim is fully to compensate the switching carrier with respect to rental paid for those cars that are handled by the switching carrier as part of a through line-haul movement. *New Orleans Public Belt R. Switching and Absorptions*, 235 I.C.C. 613, 624 (1939).[5]

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[4]Apparently at the time of the filing of the complaint there was total absorption of the switching charges by the line-haul carriers. Subsequently, the swtiching charges were increased without a concurrent increase in the line-haul carriers' absorption, resulting in partial absorption. The fact that there is partial absorption, rather than total absorption of the switching charges, does not preclude an agency relationship given the other indicia of agency present in this case.

[5]We find that the review board erred in stating that the two switching carriers pay per diem on the considered traffic but offset most of this money pursuant a per diem reclaim agreement. Defendants' reply shows that the net balance of $2,901.09 paid to the Seaboard has nothing to do with any cars involved in grain as considered in this proceeding but resulted from cars used in interterminal switching service which was exempt from the reclaim agreement. Accordingly, we find that the per diem reclaim totally offset per diem payments owed by the switching carriers to the line-haul carriers. See

All the above facts clearly make the terminal switching carriers agents of the line-haul carriers for purposes of determining which set of railroads is the "delivery carrier." It is the line-haul carrier who is contracting with the shipper/consignee and consequently the line-haul carrier is the delivering carrier and in a position to determine who is to receive demurrage. Furthermore, it is the line-haul carrier who is incurring the car-ownership costs associated with the detention of cars because of the per diem reclaim agreement. The line-haul carrier owns 76 percent of the cars used in the switching, loses the use of those cars when they are detained, and pays per diem or car rental charges on the remaining cars being detained.

While it is true that the switching lines do incur some costs for use of their tracks during the time cars are detained, these costs do not compel a finding that the retention of demurrage charges by the line-haul carriers is unreasonable. The line-haul carriers incur per diem and rental expenses on the roughly 24 percent of the cars owned by other railroads or by shippers because the per diem reclaim arrangement completely relieves the switching carriers of responsibility for per diem costs. Similarly, for the 76 percent of the cars owned by the line-haul carriers, a finding in favor of the switching railroads would leave the line-haul carriers entirely uncompensated for the shippers' use of those cars for storage during the time the cars are detained. The line-haul carriers have no way to recover those losses. In contrast, the switching carriers can raise their switching charges if that is necessary to cover the expenses they incur in providing the switching service. Also

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also *Federal Barge Lines, Inc.*, v. *Alton & S.R.*, 303 I.C.C. 669, 672 (1958); and *Increased Per Diem Charges on Freight Cars*, 268 I.C.C. 659, 672 (1947).

we note that the switching carriers incur some expenses in the recordkeeping associated with demurrage. However, such expenses are minor when compared to car ownership costs and are not sufficient to warrant a finding that the demurrage provision is unreasonable.

We also disagree with the review board's other reasons for allowing the terminal switching roads to retain the demurrage charges. The review board dismissed defendants' argument that permitting complainant to retain the demurrage would not encourage quick release of the cars. This issue is relevant in connection with the second purpose of demurrage, i.e., to ensure prompt return of equipment to service. We disagree with the board's unqualified conclusion that complainants have no reason to delay returning the cars to the line-haul carrier. While we agree there is no reason to *delay*, it is also true that there is no economic incentive to *expedite* the transfer of equipment. Under the per diem reclaim arrangement, the terminal carrier does not pay any car costs for holding the equipment less than 5 days. Allowing complainants to retain the demurrage as well would do nothing to improve the situation. Such a result does not contribute to efficient rail operations.

This interpretation is consistent with 49 U.S.C. 10750 which provides that demurrage must be computed and administered "in a way which fulfills the national needs related to (1) freight car use and distribution; and (2) maintenance or an adequate supply of freight cars to be available for transportation of property."

The complainant additionally argues that it is more administratively practical for it to collect the demurrage. Because only it is in a position accurately to determine the amount of demurrage owed, complainant argues, it

should therefore collect the demurrage charges. The board accepted this analysis; we disagree. The Southeastern Demurrage and Storage Bureau, of which the parties are members, presently assesses the demurrage charges. It does so based on the records of the PTSC and PUCC but for the account of the line-haul carriers. Complainant has not convinced us that this has not been and is not an administratively workable arrangement. Accordingly, we find unsubstantiated complainant's charge that the item is administratively impractical.

We find that the assailed tariff item which provides that demurrage charges shall accrue to the account of the inbound line-haul carrier is not unreasonable or otherwise unlawful in this particular situation. In this case, defendants have shown that, under the per diem reclaim agreement, the terminal carrier bears none of the car ownership cost. The terminal carrier here is compensated through its switching and terminal charges for the services it provides. Given this set of facts and the agency relationship, we do not believe complainant is entitled to retain the demurrage charges.

At the same time, the terminal carriers are not precluded from recovering their total costs through mechanisms other than demurrage. The most obvious method is a change in the switching agreement and charges. However, any adjustments and additional charges necessary for PTSC and PUCC fully to recover their costs through other means are for the carriers to resolve, and are not proper issues in this proceeding. The fact that complainants may not now be recovering their full costs does not justify their retention of the demurrage charges, under the circumstances here, as a substitute for their failure to use other means to recover their costs. As we have often stated, demurrage is not primarily a source of added

revenues to carriers. *Commerce & Industry, Assn. of N. Y., Inc., v. B. & O. R. Co.*, 281 I.C.C. 655, 659 (1951).

We find:

Complainant has failed to show that the assailed tariff item is unlawful.

It is ordered:

The review board decision is reversed. This proceeding is discontinued.

By the Commission, Chairman Taylor, Vice-Chairman Clapp, Commissioners Gresham and Gilliam.

Agatha L. Mergenovich,
Secretary.

(SEAL)

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 81-1923

STATE OF SOUTH CAROLINA
AND
SOUTH CAROLINA PUBLIC RAILWAYS COMMISSION,
Petitioners,

AND
THE AMERICAN SHORTLINE RAILROAD ASSOCIATION,
Petitioner Intervenor,

v.

INTERSTATE COMMERCE COMMISSION
AND
UNITED STATES OF AMERICA,
Respondents,

AND

SEABOARD COAST LINE RAILROAD COMPANY
AND
SOUTHERN RAILWAY COMPANY,
Respondent Intervenors.

On Petition for Review of a Decision of the Interstate Commerce Commission

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Argued March 3, 1982. Decided: June 30, 1982

Before HALL and SPROUSE, Circuit Judges, and ROBERT D. POTTER, United States District Judge for

the Western District of North Carolina, sitting by designation.

Frank K. Sloan, Deputy Atty. Gen., Columbia, S.C., and Peter A. Greene, Washington, D.C. (Archibald Wallace, III, Richmond, Va., Daniel R. McLeod, Atty. Gen., Columbia, S.C., Thomas C. Dorsey, V.P. and General Counsel, Am. Short Line RR. Assn., petitioner-intervenor, on brief) for petitioners.

Lawrence H. Richmond, I.C.C., Washington, D.C., (William F. Baxter, Asst. Atty . Gen., Robert S. Burk, Acting Gen. Counsel, Henri F. Rush, Assoc. Gen. Counsel, John J. Powers III, and Kenneth P. Kolson, Washington, D.C., on brief) for respondents.

John Charles Thomas, Richmond, Va. (T.S. Ellis, III, Richmond, Va., Richard A. Hollander, Seaboard Coast Line RR. Co., Richmond, Va., and James L. Howe, III, Southern Rwy. System, Washington, D.C. on brief) for respondent-intervenors.

PER CURIAM:

Petitioners seek review of a decision by the Interstate Commerce Commission (I.C.C.) that the line-haul carriers and not the terminal switching carriers are legally entitled to demurrage charges paid by the shipper. Petitioners contend that the tariff which imposes this pay arrangement is unlawful, unjust, and unreasonable and that the decision of the I.C.C. is unsupported by substantial evidence and is an unexplained, radical departure from agency precedent. We disagree.

PROCEDURAL HISTORY

In 1979, petitioner, South Carolina Public Railways Commission, which operates two terminal railroads ("switching lines") at Charleston, South Carolina,[1] filed a complaint against respondent-intervenor railroad companies ("line-haul carriers") with the I.C.C. The relief requested was the cancellation of a tariff item which respondent-intervenors "caused to have published," effective August 6, 1977.

The Administrative Law Judge and the Board of Review, on appeal, held the tariff item to be unjust and unreasonable. However, the Commission rejected the examiner's findings and reversed the decision of the Review Board. It is this decision by the Commission, which petitioners contend should be set aside, and which is a final and reviewable agency action under 5 U.S.C. § 704 (1970). This Court must defer to the final decision of the Commission, unless we find it to be "arbitrary, capricious, an abuse of discretion . . . [or] unsupported by substantial evidence." 5 U.S.C. § 706(2)(A), (E) (1970).

BACKGROUND

Respondent-intervenors, the line-haul carriers, interchange carloads of grain with the switching lines, which petitioner SCPRC operates at its North Charleston, South Carolina yards. The switching lines then notify the shipper, South Carolina Farm Bureau Marketing Association, and either place the rail cars for unloading at the shipper's grain elevator or hold the cars until such placement is

[1]The two switching lines are the Port Terminal Railroad of South Carolina (PTSC) and the Port Utilities Commission of Charleston (PUCC). Most of the facts developed in this case center upon PTSC.

possible. For this service and the attendant maintenance costs, the switching carriers charge the line-haul carriers a switching fee.

Ordinarily, when one railroad uses cars belonging to another, a rental payment or *per diem* is assessed. However, switching carriers may negotiate agreements with the line-haul carriers whereby the *per diem* otherwise owed for line-haul cars used by the switching lines would be refunded in lieu of a switching fee.[2] The amount of the refund would necessarily depend upon the amount of the switching fee. This negotiation is known as a "*per diem* reclaim agreement."

A shipper that detains cars unnecessarily is using rail cars as warehouses and impeding efficient rail service. To deter such conduct and to secure compensation for the use of both the rail cars and the tracks, the shipper must pay a demurrage charge for each day a rail car is detained beyond a 24-hour "free time" period, until the car is returned to the line-haul carriers.[3] The carriers normally agree as to whom the demurrage should be paid. Prior to August 6, 1977, the demurrage charge in this case was paid by the shipper to the switching carriers. However, under the tariff item in dispute, this charge is collected by the line-haul carriers. Therefore, the switching carriers are able to collect from the line-haul carriers a switching fee and/or a refund of *per diem*. The switching carriers are prevented by tariff from collecting demurrage from the shipper.

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[2]Rule 5, Car Hire Rules of the Association of American Railroads, See, *New Orleans Public Belt R. Switching and Absorption*, 235 I.C.C. 609, 624, (1939).

[3]See generally, *I.C.C. v. Oregon Pacific Industries, Inc.*, 420 U.S. 184, 95 S.Ct. 909, 43 L.Ed.2d 121 (1975); *Manongahela Power Co. v. I.C.C.*, 640 F.2d 504 (4th Cir. 1981).

DISCUSSION

The I.C.C. upheld the tariff item in dispute which states:

> "Cars shall remain in the demurrage account of the inbound line-haul railroad and demurrage charges shall cease to accrue at the time each car is released."

Paragraph (f) of Item 380 Series to Southern Freight Association, Agent, Southern Grain Export Tariff 988-A, I.C.C. S-909, first published in Supplement 196, effective August 6, 1977.

The decision was based upon two findings:

(1) the line-haul carrier is the delivering carrier, entitled to demurrage.

  (a) the switch line is the agent of the line-haul carrier in the delivery of the rail cars.

  (b) the line-haul carriers incur the expenses associated with unnecessary detention of rail cars.

(2) the tariff is not unjust, unreasonable, or unlawful in its application.

If these findings are supported by substantial evidence and are not arbitrary or capricious, the decision of the I.C.C. must be upheld.

There are two factors that the I.C.C. considers for the collection of demurrage. The first is the line upon which the detention occurs. *Demurrage Rules and Charges, Nationwide,* 340 I.C.C. 83, 92 (1971). This is the factor which petitioners contend mandates reversal, since it is uncontested that the detention occurs on the switching lines.

However, the remaining factor, the "delivering carrier" determination, supports the validity of the tariff item.

When detention of rail cars occurs at the end of a multicarrier movement, the demurrage charges are traditionally collected by the "delivering carrier." *Remittance of Demurrage Charges,* 353 I.C.C. 567, 589 (1977); *B & O.C.T.R. Co. v. United States,* 583 F.2d 678, 681 n. 3 (3d Cir. 1978), *cert. denied,* 440 U.S. 968 (1978). The determination of which line is the "delivering carrier" is a two-step analysis. First, the relationship between the line-haul carriers and the switching carriers is examined for indicia of agency. Second, the carrier incurring the costs associated with the detention is identified.

The I.C.C. found that the switching carriers were not "delivering carriers," but merely their agents. In this case, only the line-haul carriers and the shipper were named in the bills of lading. Therefore, the switching lines must operate as the agents of one of the parties named in the bills of lading. *Missouri Pacific R.R. Co. v. Reynolds Davis Grocery Co.,* 268 U.S. 366, 69 L.Ed. 1000, 45 S.Ct. 516 (1925). The line-haul carriers and the switching carriers do not divide a single rate or present a joint rate to the shipper. Instead the line-haul carriers absorb, to a great extent, the switching fees, demonstrating that the switching lines have an agency relationship with the line-haul carriers, rather than maintaining an independent contractor status. *Sioux City & N.O. Barge Lines, Inc. v. Chicago & N.W. Ry. Co.,* 303 I.C.C. 537, 545-46 (1958). The switching lines' independent status is further weakened by the evidence of total reclaim of any *per diem* otherwise owed by the switching lines to the line-haul carriers. Terminal carriers are commonly agents for the delivering carrier [*A.F. Pringle & Co. v. Atlantic Coast Line R.R.*

Co., 278 I.C.C. 655, 657 (1950)], and the I.C.C. based its finding of agency in this case upon substantial evidence and precedent.

The second step in determining which line is the "delivering carrier" is to find the carrier which incurs the costs associated with the detention of the rail cars. *Union Belt of Detroit Pooling of Revenues,* 201 I.C.C. 577, 580 (1934). In the case at bar, the line-haul carriers must pay *per diem* on approximately 22% of the cars used since they are owned by other carriers, although no *per diem* is received from the switching lines under the *per diem* reclaim agreement. Further, it is the line-haul carriers which lose the operation and revenue generation of the cars detained; the revenue-generating activities of the switching lines continue during detention. Therefore, the determination that the line-haul carriers are the "delivering carriers," legally entitled to collect demurrage, is substantially supported by the record and prior decisions of the I.C.C.

Petitioners maintain that the imposition of the tariff item is unjust, unreasonable, and unlawful. Their primary concern is loss of "revenue" obtained from the demurrage charges. Demurrage is not "revenue" for carriers [*Commerce and Industry, Assn. of New York, Inc. v. B. & O.R.R. Co.*, 281 I.C.C. 655 (1951)]; it is a deterrence and compensation for both cars and tracks. Petitioners may apply for increased revenues through switching fees or other separate charges. Petitioners also object to the new procedures for assessment and collection of demurrage charges under the tariff item; however, no evidence presented contradicts the conclusion of the I.C.C. that a workable arrangement exists. Finally, petitioners contend that the tariff is unlawful because it encourages delay, impeding efficient "freight car use and distribution and

maintenance of an adequate supply of freight cars for transportation." 49 U.S.C. § 10750 (1978). The weakness of this argument is that the shipper controls the flow of rail cars and pays the demurrage for delay. The decision to permit one carrier over another to collect the demurrage has a neutral effect upon the motivation of the shipper to avoid the charges by efficient rail use.

We find the decision by the I.C.C. to uphold the validity of tariff item 380(f), is supported by substantial evidence and is not arbitrary nor capricious.

AFFIRMED.

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

June 30, 1982

TO:

Archibald Wallace, III, Esq.
Daniel R. McLeod, Esq.
Frank K. Sloan, Esq.
T. S. Ellis, III, Esq.
John Charles Thomas, Esq.
James L. Howe, III, Esq.
Lawrence H. Richmond, Esq.
James L. Howe, III, Esq.
Lawrence H. Richmond, Esq.

NOTICE OF JUDGMENT

Judgment was entered in Case No. 81-1923 this date.

The Court's opinion is enclosed.

PETITION FOR REHEARING (FRAP 40)

A petition may be filed within 14 days after judgment. *No extension will be granted save for the most compelling reasons.* Requests based on grounds such as miscalculation of time or a need to consult with others will be peremptorily denied.

A petition should only be made to direct the Court's attention to one or more of the following situations:

1. A material fact or law overlooked in the decision.

2. A change in the law which occurred after the case was submitted and which was overlooked by the panel.

3. An apparent conflict in order merely to reargue the case is an abuse of the privilege.

A petition shall contain an introduction stating that, in counsel's judgment, one or more of the situations exist as described in the above "Purpose Section". The points to be raised shall be succinctly listed in the statement. Lacking such a statement, the petition will be returned to counsel without filing.

The 15 page limit allowed by the Rule shall be observed. The Court requires 15 copies of the petition; however, a pro se party who is indigent may file the original only.

BILL OF COSTS (FRAP 39)

A party to whom costs are allowed, who desires taxation of costs, shall filed a bill of costs within 14 days after judgment.

MANDATE (FRAP 41)

The mandate is issued 21 days after judgment. A timely petition for rehearing will stay the issuance. If the petition is denied, the mandate will issue 7 days later. If a stay of mandate is sought, only the original of a motion need be filed.

William K. Slate, II
Clerk

APPENDIX F

Section 10750 of the Revised Interstate Commerce Act, 49 U.S.C. § 10750, provides:

> A rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title shall compute demurrage charges, and establish rules related to those charge, in a way that fulfills the national needs related to—
>
> (1) freight car use and distribution; and
>
> (2) maintenance of an adequate supply of freight cars to be available for transportation of property.

Section 11707(a)(1) of the Revised Interstate Commerce Act, 49 U.S.C. § 11707(a)(1), provides:

> (a)(1) A common carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under subchapter I, II, or IV of chapter 105 of this title shall issue a receipt or bill of lading for property it receives for transportation under this subtitle. That carrier and any other common carrier that delivers the property and is providing transportation or service subject to the jurisdiction of the Commission under subchapter I, II, or IV are liable to the person entitled to recover under the receipt or bill of lading. The liability imposed under this paragraph is for the actual loss or injury to the property caused by (1) the receiving carrier, (2) the delivering carrier, or (3) another carrier over whose line or route the property is transported in the United States or from a place in the United States to a place in an adjacent

foreign country when transported under a through bill of lading and applies to property reconsigned or diverted under a tariff filed under subchapter IV of chapter 107 of this title. Failure to issue a receipt or bill of lading does not affect the liability of a carrier. A delivering carrier is deemed to be the carrier performing the line-haul transportation nearest the destination but does not include a carrier providing only a switching service at the destination.